No. 14,532

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

I. H. SPEARS,

Appellant,

vs.

TRANSCONTINENTAL BUS SYSTEM, INC.,

Appellee.

REPLY BRIEF OF APPELLEE.

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Statement of the Case.

In March, 1953, plaintiff, a negro, purchased a ticket from defendant, Transcontinental Bus System, Inc., which provided for transportation by bus from San Francisco, California to New Orleans, Louisiana and return [Rep. Tr. p. 22, line 22, to p. 23, line 6; Tr. of Rec. p. 34, line 26, to p. 35, line 5]. Plaintiff boarded the bus in Los Angeles, California [Rep. Tr. p. 23, lines 8-10] and rode in the fourth seat from the driver to Winona, Mississippi, at which point the driver of the bus forced him to move to the rear seat of the bus where other negros were sitting [Rep. Tr. p. 23, line 8; p. 27, line 24].

Alleging this was a violation of his civil rights plaintiff filed this action for damages against Transcontinental

Bus System, contending that defendant's employee committed the alleged wrong [Tr. of Rec. pp. 2-4].

Defendant's answer and its admissions later filed, denied the incident was occasioned by its employees and that it occurred in any territory served by it or on any bus under its control [Tr. of Rec. pp. 20-21; Exs. 7 and 9].

Trial resulted in judgment for defendant [Tr. of Rec. p. 37], which judgment was based on Findings of Fact and Conclusions of Law [Tr. of Rec. pp. 34-36].

The Evidence.

Rex S. Fifield, traffic manager, and Arthur Nay, general manager of the western division of defendant were called by plaintiff under Rule 43(b), Federal Rules of Civil Procedure.

They established that several different companies controlled the operation of the bus on plaintiff's route [Rep. Tr. p. 12, line 6, to p. 13, line 6; p. 45, line 6, to p. 47, line 15]. This testimony showed that at Winona, Mississippi, where the alleged discrimination occurred, the bus was under the control of Continental Southern Lines [also see Rep. Tr. p. 16, line 19, to p. 17, line 8].

Continental Southern Lines is a separate corporation, of which defendant Transcontinental Bus System owned the controlling stock interest [Rep. Tr. p. 19, lines 2-8; p. 75, lines 10-15].

The revenue from the fares allocated to the portion of the route served by Continental Southern Lines was received wholly by Continentaal Southern [Rep. Tr. p. 47, line 25, to p. 48, line 7].

Continental Southern Lines was operated by its own directorship and the rules and regulations of the various companies as to direction and control of bus operators were made by the directors of the separate corporations [Rep. Tr. p. 47, line 21, to p. 49, line 1].

There were no contractual agreements between Continental Southern Lines and Transcontinental Bus System as to transportation of passengers except as found in the National Tariff Authority [Rep. Tr. p. 42, line 6, to p. 44, line 10].

The ticket which Mr. Spears purchased contained the following provision:

> "In selling this ticket and checking baggage, the selling carrier acts only as agent and is not responsible beyond its own lines" [Rep. Tr. p. 52, lines 7-16].

This same provision was set out in the National Passenger Tariff A-1000, Section A-1, Rule No. 6, which authority was filed with and had the approval of the Interstate Commerce Commission [Rep. Tr. p. 50, line 22, to p. 52, line 5].

Mr. Spears admitted that he had read that provision on other tickets he had purchased and he assumed it was on the ticket he was using for the trip in question [Rep. Tr. p. 34, line 2, to p. 36, line 2].

Mr. Spears testified he was not riding on the same bus he had boarded in Los Angeles when the alleged incident occurred, having changed buses at Hot Springs, Arkansas [Rep. Tr. p. 37, lines 1-17].

ARGUMENT.

I.

There Was No Error by the Trial Court in Respect to Appellant's Request for Admission Under Rule 36 or Appellee's Responses Thereto.

We are not quite certain of the point appellant is seeking to raise by his brief relating to this question. His argument is found at pages 11 and 12 of his opening brief on appeal.

The transcript of the trial shows that appellant made 33 requests for admissions. 27 of these were answered by appellee. The hearing was had on objections to the balance, after which hearing additional admissions were filed. These admissions were introduced in evidence as Exhibits 8 and 9 [Rep. Tr. p. 96, line 4, to p. 97, line 22]. These admissions have not been incorporated as part of the Transcript of Record on Appeal. In their essence it may be fairly said that they deny any exercise of authority by Transcontinental Bus System over the driver in charge of the bus on which Mr. Spears was riding at the time of the alleged discrimination at Winona, Mississippi. They simply raise an issue of fact which was the subject matter of the evidence received at the trial. This, of course, is the function of the procedure outlined by Rule 36 of the Federal Rules of Civil Procedure. Having complied with the rule, Appellee submits that there is no error in respect thereto either in procedure or in the manner in which the trial court considered the admissions as constituting evidence and creating issues of fact.

II.

The Court Did Not Err in Determining That Transcontinental Bus System, Inc., Was Not Liable for Alleged Discrimination.

The principal issue for determination in this case is whether Transcontinental Bus System, Inc., had control of, or were the operators of the bus at the time and place of the alleged discrimination. The Court found that it did not [Tr. of Rec. p. 35, line 19, to p. 36, line 7].

This finding is fully supported by the evidence and the law. The evidence showed that Transcontinental Bus System, Inc., did not operate buses at Winona, Mississippi, but that the bus on which plaintiff was riding at that time was being operated by Continental Southern Lines.

The fact that Transcontinental Bus System, Inc., owned the majority of the stock of Continental Southern Lines did not impose liability upon Transcontinental Bus System, Inc., for the acts of an employee under the control of Continental Southern Lines. The law is well established that mere stock ownership will not make the parent company liable for the acts of a subsidiary company.

In *Marr v. Postal Union Life Insurance Company,* 50 Cal. App. 2d 673, 681, the Court held:

> "Before the Courts will disregard the corporate entity of one corporation and treat it as the *alter ego* of another, even though the latter may own all the stock of the former, it must further appear that there is such a unity of interest and ownership that the individuality of the one corporation and the owner or owners of its stock has ceased, and further, that the obesrvance of the fiction of separate existence would under the circumstances sanction a

> fraud or promote injustice. In other words, bad faith in one form or another must be shown before the Court may disregard the fiction of separate corporate existence."

In *Burkey v. Third Ave. R. Co.,* 244 N. Y. 84, 155 N. E. 58, 50 A. L. R. 599, plaintiff sued for injuries sustained while alighting from a street car operated by the Forty-second Street Company. Substantially all of the stock of that company was owned by defendant Third Ave. R. Co. It was contended that because of the common ownership the Third Ave. R. Co. was liable for the tort of Forty-second Street Company. At page 600 of the opinion as found in 50 A. L. R. the Court, speaking through Mr. Justice Cardozo, said:

> "Stock ownership alone would be insufficient to charge the dominant company with liability for the torts of the subsidiary."

To the same effect is:

> *Philadelphia & Reading Railway Company v. McKibbin,* 243 U. S. 264, 37 S. Ct. 280, 282.

In connection with recent antitrust litigation the distinct entity of separate corporation notwithstanding, common ownership of stock is clearly recognized. Examples of these cases are:

> *United States v. Yellow Cab Company,* 332 U. S. 218, 67 S. Ct. 1560, 1566;
>
> *Kiefer-Stewart Company v. Seagram & Sons,* 340 U. S. 211, 71 S. Ct. 259, 261;
>
> *Timken Roller Bearing Company v. United States,* 341 U. S. 593, 71 S. Ct. 971, 974.

The law is also well-established that an issuing carrier is not responsible for the transportation of passengers beyond its own line. In *Louisville & N. R. Co. v. Chatters,* 279 U. S. 320, 49 S. Ct. 329, the plaintiff purchased a ticket and commenced his journey over the lines of Louisville & Nashville Railway. At New Orleans the operation was conducted by Southern Railway Co. as a connecting carrier. While on this operation plaintiff was injured when a window pane was broken. The Court held at page 332 as follows:

> "Neither of them, as a common carrier, was under any duty, either by the common law or statute, to transport or assume any responsibility for the transportation of respondent beyond its own line."

In *Solomon v. Pennsylvania Railway Co.,* 96 Fed. Supp. 709, Pennsylvania sold plaintiff a ticket for transportation from New York to Florida and carried plaintiff to Richmond, Virginia. At that point the train was taken over and operated by Atlantic Coast Line and thereafter plaintiff, a negress, was forced to move to a different car. The case was dismissed as to Pennsylvania Ry. Co. The trial court pointed out at page 710 of the opinion that Pennsylvania Ry. Co. was merely the agent for Atlantic Coast Lines in the sale of the ticket for that part of the journey made over Atlantic Coast Lines tracks and that none of the acts complained of were committed by Pennsylvania's employees.

The same rule was established in the early case of *Kirk v. Kimball,* 152 Cal. 180, 184.

In addition to the foregoing principles of law, it is well established that the published tariffs are part of a contract of carriage and that when such tariff limits the

responsibility of an originating carrier by a statement that it is not responsible beyond its own line, such provision becomes a part of the contract of carriage and is binding upon the carrier and its patrons. (*Louisville & N. R. Co. v. Chatters,* 279 U. S. 320, 49 S. Ct. 329, 332, wherein the identical limitations appeared in the tariff and ticket as we find in the case at bar.)

As above set out, in addition to the tariff provisions appearing on the ticket and the published tariff with the Interstate Commerce Commission, Mr. Spears testified to his knowledge that such provisions were on these tickets and that he assumed it was on the one by which he was riding at the time of the alleged incident.

The authorities cited under Points 2 and 3 of appellant's brief (pp. 12-17 thereof) were not in point to the factual situation in the case at bar. The portions of the Interstate Commerce Act cited at page 14 (49 U. S. C. A., Sec. 20, Subsec. 11) relate to carrying of freight and involve an entirely different statute rule. So likewise does the case of *Pacific etc. v. Minneapolis etc.,* 105 Fed. Supp. 794.

The case of *Harmon v. Barker,* 247 Fed. 1, cited on page 14 of Mr. Spears' brief is authority for the contention of defendant and appellee. It is there pointed out that the originating carrier would not be liable for a negligent injury to a passenger being carried by a connecting carrier.

The cases of *Kemp v. Transfer Co.,* 70 Fed. Supp. 521; *Hedges v. Johnson,* 52 Fed. Supp. 488; and *Emergency*

Corp. v. Weidenhouse, 169 F. 2d 405, all relate to situations where a lessee hauling under an I. C. C. truck permit of another cannot relieve the permittee from responsibility for the lessee's acts. There was no such proof in this case. The plaintiff did introduce certain rulings of the I. C. C. [Rep. Tr. p. 55, *et seq.*] but these only deal with the corporate relationship by way of stock ownership between the defendant and various subsidiary and affiliated companies. They do not deal with the question of control of transportation or responsibility [this was pointed out by the trial court, Rep. Tr. p. 55; p. 19, lines 5-12]. Neither do they purport to set out the franchise issued by the I. C. C. for bus operations in the territories in question.

III.

The Trial Court Neither Demonstrated nor Had Any Prejudice Against Appellant.

This is the last alleged error and appellant's discussion appears at page 17 of his opening brief. He cites no part of the record demonstrating his claim of prejudice of the trial court. We take opposition to appellant's statements, particularly in view of his failure to demonstrate by the record anything in support of his claim. We submit the record shows that the trial court was particularly solicitous to see that he understood the position of appellant and to see that appellant had full and complete opportunity to present all of the evidence to best support his cause of action.

Conclusion.

It is respectfully submitted that there were no errors at the trial and that the findings and judgment of the trial court are fully supported by the record of the testimony and the law applicable to this case.

Respectfully submitted,

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